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No. 93-471

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1993

COY U. SPAWN, JR., PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Federal Deposit Insurance Corporation is immune from prejudgment interest when it makes an erroneous deposit insurance determination.

2. Whether the district court applied the wrong standard in determining that petitioner was entitled to attorney fees under the Equal Access to Justice Act because the government's position was not "substantially justified."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A25) is reported at 989 F.2d 830. The decision of the district court (Pet. App. B1-B12) is unreported. The opinion of the court of appeals at the merits stage of the litigation is reported at 925 F.2d 885.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 1993. A petition for rehearing was denied on June 21, 1993. Pet. App. C1-C2. The petition for a writ of certiorari was filed on September 20, 1993 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On July 7, 1986, petitioner Coy U. Spawn, Jr., and his sister, Bernadette A. Spawn, opened two certificate of deposit accounts at Western Bank-Westheimer, each in the amount of $100,000. Each certificate of deposit, and the signature cards for each account, listed both petitioner and Bernadette Spawn as owners, and indicated that the accounts were "Joint W/Right of Survivorship." Both petitioner and Bernadette Spawn signed the signature cards for both accounts. Pet. App. A2.

The Texas State Banking Commissioner declared Western Bank-Westheimer insolvent on October 1, 1987.[1] The Federal Deposit Insurance Corporation undertook a review of the bank's deposit account records to determine the amount of deposits that were federally insured. After reviewing the records of the Spawns' certificates of deposit, the FDIC determined under its regulations that because both accounts were listed as joint accounts, with the same owners, they must be aggregated for deposit insurance purposes. See 12 C.F.R 330.9(d) (1990). Because the aggregate amount of the accounts exceeded the $100,000 statutory maximum insurance amount, the FDIC determined that petitioner's certificate of deposit was uninsured. Pet. App. A2-A3.

2. On March 30, 1989, petitioner filed a complaint against the FDIC in its corporate capacity as insurer of deposit accounts. Petitioner alleged that the

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[1] Although the court of appeals states (Pet. App. A2) that the bank was declared insolvent three months after the Spawns' deposit, the dates given above and at Pet. 5-6 are correct. See *Spawn* v. *Western Bank-Westheimer*, 925 F.2d 885, 886 (5th Cir. 1991).

account that the FDIC had determined was jointly owned, and therefore uninsured, was in fact separately owned by him individually and therefore entitled to separate insurance coverage. The complaint also sought prejudgment interest and attorney fees. Pet. App. A3.

The FDIC filed a motion for summary judgment, which was granted by the district court. The district court held that the FDIC properly looked to the deposit records and signature cards to find that the accounts were jointly owned. Pet. App. A3-A4.[2]

On appeal, the Fifth Circuit reversed. *Spawn* v. *Western Bank-Westheimer*, 925 F.2d 885 (1991) (*Spawn I*). The court reviewed the FDIC's deposit insurance decision under the Administrative Procedure Act, 5 U.S.C. 706(2)(A), noting that the decision could be set aside only if it was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance

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[2] The FDIC relied on two provisions of its deposit insurance regulations to argue that it need not look beyond the bank's account records in determining that petitioner's account was jointly owned:

> 12 C.F.R. 330.1(b) (1990) *Records.* (1) The deposit account records of the insured bank shall be conclusive as to the existence of any relationship pursuant to which the funds in the account are deposited and on which a claim for insurance coverage is founded * * *.
>
> 12 C.F.R. 330.9(b) (1990) *Qualifying joint accounts.* A joint deposit account shall be deemed to exist, for purposes of insurance of accounts, only if each coowner has personally executed a deposit account signature card and possesses withdrawal rights. The restrictions of this paragraph shall not apply to coowners of a time certificate of deposit or to any deposit obligation evidenced by a negotiable instrument, but such a deposit must in fact be jointly owned.

with the law." 925 F.2d at 887. The court nevertheless rejected the FDIC's interpretation of its regulation concerning joint ownership of certificates of deposit (12 C.F.R. 330.9 (1990))—an interpretation permitting reliance on the deposit account records of the insured bank—holding instead that the regulation required the FDIC to determine whether the account was *in fact* jointly owned under state law.[3] 925 F.2d at 888-889. On remand, the FDIC considered the records submitted by petitioner and determined that under the test set out by the Fifth Circuit, petitioner's account was individually owned and was entitled to additional deposit insurance. Pet. App. A5.

3. The only remaining issues before the district court were petitioner's requests for prejudgment interest and attorney fees and costs under the Equal Access to Justice Act, 28 U.S.C. 2412. After trial on those issues, the district court stated its findings of fact and conclusions of law. Pet. App. B1-B12. The court found that the FDIC's statute did not provide an express waiver of sovereign immunity for interest awards. However, because the FDIC's statute contains a "sue and be sued" clause and because the district court concluded that the FDIC was engaging in the "business of insurance," and not in any governmental activity, the court found it liable for prejudgment interest in this case. Pet. App. B6-B11. The court also found that petitioner was entitled to attorney fees, stating (Pet. App. B2):

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[3] The court explained (925 F.2d at 889):

> In sum, the FDIC's interpretation of the regulations at issue contradicts the unambiguously expressed directions they contain. We may not defer to that erroneous interpretation, which is not "in accordance with the law."

> FDIC has not established that its position was substantially justified. The Fifth Circuit found that FDIC's decision to deny insurance coverage on [petitioner's] certificate of deposit was arbitrary and capricious or otherwise not in accordance with law. The Fifth Circuit further found that FDIC's interpretation of the regulation contradicted the unambiguously express directions that they contained. That is the reason for my finding.

4. The court of appeals reversed both awards. The court applied the general rule that "interest cannot be recovered in a suit against the Government in the absence of an express waiver of sovereign immunity from an award of interest." *Library of Congress* v. *Shaw*, 478 U.S. 310, 311 (1986). Since Congress did not expressly waive the FDIC's immunity from interest awards (Pet. App. A10), the court considered the "commercial enterprise" exception to the no-interest rule relied on by the district court and discussed in *Loeffler* v. *Frank*, 486 U.S. 549 (1988). The court concluded that "the FDIC does not constitute a commercial enterprise within the meaning of *Loeffler*" (Pet. App. A17), and is therefore immune from prejudgment interest awards when making deposit insurance determinations. Pet. App. A19.

Turning to the issue of attorney fees, the court reviewed the applicable standards under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d), as explicated in *Pierce* v. *Underwood*, 487 U.S. 552 (1988).[4] The court determined (Pet. App. A23-A24)

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[4] The appendix to the petition reproducing the opinion contains, in addition to numerous typographical errors, an omission from the opinion's description of this Court's holding in

that the district court's findings were "infected with an error of law" because the district court had concluded that simply "because the FDIC was unsuccessful in *Spawn I*, its position was not substantially justified." The court stated that its earlier decision "rested not on the unreasonableness of the FDIC's position, but rather on a need to make sense out of a confusing regulation." Pet. App. A24. After reviewing the record, the court of appeals held that the district court had abused its discretion in concluding that the FDIC's litigating position was not substantially justified. Pet. App. A23-A25.

ARGUMENT

The Fifth Circuit correctly applied settled law to the facts of this case. Petitioner's contention that the court of appeals' decision creates a conflict among the circuits, and is in conflict with prior rulings of this Court, is incorrect. The decision below is, however, in conflict with a subsequent decision of the Second Circuit on the EAJA issue (*Federal Election Commission* v. *Political Contributions Data, Inc.*, 995 F.2d 383 (1993)). Accordingly, the Court may wish to hold this petition pending consideration of a petition shortly to be filed in *Political Contributions Data*.

Pierce v. *Underwood*. The first sentence on Pet. App. A21 should read as follows (the portions omitted from the appendix to the petition are italicized):

> [The Court in *Pierce* v. *Underwood*] explained that the government's position, to be "substantially justified," need not be " 'justified to high degree,' but rather 'justified *in substance or in the main*'—*that is, justified* to a degree that would satisfy a reasonable person."

1. Petitioner first contends, Pet. 10-11, that the Fifth Circuit misapplied this Court's decision in *Loeffler* v. *Frank*, 486 U.S. 549 (1988), in concluding that the FDIC is not subject to prejudgment interest as a "commercial enterprise." In *Loeffler*, this Court held that the Postal Service is subject to prejudgment interest. It reasoned (486 U.S. 556):

> By launching the Postal Service into the commercial world, and including a sue-and-be-sued clause in its charter, Congress has cast off the Service's cloak of sovereignty and given it the status of a private commercial enterprise. It follows that Congress is presumed to have waived any otherwise existing immunity of the Postal Service from interest awards. [Internal quotation marks and citation omitted].

Under *Loeffler*, the question whether an agency is a "commercial enterprise" is determined by looking to congressional intent at the time of the agency's inception. 486 U.S. at 554, 556. In *FDIC* v. *Philadelphia Gear Corp.*, 476 U.S. 426, 432-433 (1986), this Court undertook a *Loeffler*-type review of congressional intent in creating the FDIC:

> Faced with virtual panic, Congress attempted to safeguard the hard earnings of individuals against the possibility that bank failures would deprive them of their savings. Congress passed the 1933 provisions "[i]n order to provide against a repetition of the present painful experience in which a vast sum of *assets and purchasing power* is 'tied up.'" S. Rep. No. 77, 73d Cong., 1st Sess., 12 (1933) (emphasis added [by Court]). * * * To prevent bank failure that resulted in the tangible loss of hard

> assets was therefore the focus of Congress' effort in creating deposit insurance.

The FDIC was created to resolve a critical national economic problem. This history is in marked contrast to the origins of the modern Postal Service:

> Congress has directed the Service to become a self-sustaining service industry and to "seek out the needs and desires of its present and potential customers—the American public" and to provide services in a manner "responsive" to the "needs of the American people." H.R. Rep. No. 91-1104, [pp. 19-20 (1970)].

United States v. *Kokinda*, 497 U.S. 720, 732 (1990) (plurality opinion of O'Connor, J.); see *Franchise Tax Board of California* v. *United States Postal Service*, 467 U.S. 512, 519-520 & n.13 (1984) (Congress "wished the Postal Service to be run more like a business than had its predecessor, the Post Office Department."). Given these differences between the two agencies, *Loeffler* does not support the district court's award of prejudgment interest. Instead, the court of appeals correctly followed the *Loeffler* analysis, and concluded that the FDIC as insurer is not a "commercial enterprise" and is therefore immune to prejudgment interest awards.[5]

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[5] Moreover, as the court of appeals recognized (Pet. App. A17), *Loeffler* specifies that interest is recoverable under the "commercial enterprise" exception "to the extent that interest is recoverable against a private party as a normal incident of suit." 486 U.S. at 557. This suit was brought under the judicial review provisions of the Administrative Procedure Act, which contains no authorization for the recovery of prejudgment interest. Moreover, a suit to recover deposit insurance has no private party equivalent. Thus, even if the FDIC as insurer

Petitioner incorrectly contends, Pet. 11-12, that the decision below is in conflict with *North New York Savings Bank* v. *Federal Savings & Loan Insurance Corp.*, 515 F.2d 1355 (D.C. Cir. 1975) and *Far West Federal Bank* v. *Office of Thrift Supervision*, 930 F.2d 883 (Fed. Cir. 1991). Neither decision addresses the issue before the court in this case. In *North New York Savings Bank*, the court awarded prejudgment interest in circumstances far different from those in the instant case,[6] while *Far West* did not involve a

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were a "commercial enterprise," interest would not be recoverable against the FDIC because interest would not be recoverable against a private party as a normal incident of suit.

[6] In *North New York Savings Bank*, the bank's deposits were insured by the Federal Savings and Loan Insurance Corporation (FSLIC), a predecessor of the FDIC. The bank prepaid future premiums to the FSLIC's Secondary Reserve, as required by statute. When it converted to FDIC insurance, the bank requested the return of its pro rata share of the Secondary Reserve and the accrued interest on that share. The FSLIC returned the pro rata share, but declined to pay the accrued interest. The court of appeals upheld the bank's claim for interest from the date it ceased to be a FSLIC-insured institution until FSLIC refunded the institution's share of the reserve. In awarding this interest, the court stated (515 F.2d at 1364):

> Mindful of the general rule that the United States is not liable for interest on claims against it in the absence of a statute or contract, we are satisfied that the rule is not applicable to this situation. Congress provided [in 12 U.S.C. § 1727(e)] that the pro rata shares of the Secondary Reserve earn interest at the FSLIC-determined rate (5.537954 percent for 1971). From October 1 through December 13, 1971, FSLIC held North New York's pro rata share and presumably earned interest thereon at that rate.

Thus, in *North New York* there was both a statutory basis for the payment of interest by the FSLIC, and no disagreement

claim for prejudgment interest at all.[7]

The Fifth Circuit's opinion in this case is entirely consistent with the decision of the only other court of appeals to address the precise issue. *Philadelphia*

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that the funds belonged to North New York after the date of conversion. In this case there is no statutory basis for the payment of interest on deposit insurance payments, and petitioner's entitlement to payment was in dispute. Although the *North New York* court found that the FSLIC was "to a degree" comparable to "traditional insurance companies" in the context of the risk the agency assumed, 515 F.2d at 1359, and stated that "FSLIC is in the insurance business and is assumed to have accepted the ordinary incidents of suits in such business," *id.* at 1364, that court did not address the question that *Loeffler* subsequently identified as the controlling consideration in this type of case: whether Congress intended the FSLIC to be a "commercial enterprise."

[7] *Far West* arose out of the government's attempt to enforce regulatory requirements on Far West. Far West sued, seeking restitution of certain investment funds and rescission of an agreement it had made with the Federal Home Loan Bank Board that modified regulatory requirements. At issue on appeal was whether Far West's claim was cognizable by the district court or could be brought only in the Claims Court. The Federal Circuit construed the FDIC's sue-and-be-sued clause as a general waiver of sovereign immunity and allowed the claim to be brought in district court. In reaching this decision, the court noted that the sue-and-be-sued clause "accommodates the commercial and business context in which [the FDIC and its predecessors] operate[]" (930 F.2d at 888), and has been construed as a waiver of sovereign immunity in a number of circumstances (referring to *North New York* as one example). But the court had no occasion to address whether the FDIC would be liable for prejudgment interest in any circumstances, and certainly not whether it would be liable in the narrow context to which the court below confined its decision—that of "erroneous deposit insurance determinations." Pet. App. A19.

Gear Corp. v. *FDIC*, 751 F.2d 1131 (10th Cir. 1984), rev'd on other grounds, *FDIC* v. *Philadelphia Gear Corp.*, 476 U.S. 426 (1986). In *Philadelphia Gear*, the Tenth Circuit rejected the district court's award of prejudgment interest in a deposit insurance case, on the ground that the Federal Deposit Insurance Act does not provide an express waiver of sovereign immunity for the award of interest. 751 F.2d at 1138-1139. More recently, in *Sandia Oil Co.* v. *Beckton*, 889 F.2d 258 (1989), the Tenth Circuit considered a claim for post-judgment interest on a flood insurance claim under a program of the Federal Emergency Management Agency. Like the deposit insurance program at issue here, the flood insurance program is a subsidized program "designed to accomplish important national goals at some cost to the national treasury." *Id.* at 263-264. After considering both the "express waiver" exception to the general no-interest rule discussed in *Shaw* and the "commercial enterprise" exception discussed in *Loeffler*, the court concluded that the underlying statute contained no express waiver that would allow the payment of interest, *and* that the flood insurance program was not a commercial enterprise. *Ibid.*[8] The Fifth Circuit

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[8] The *Sandia* court distinguished *Standard Oil Co.* v. *United States*, 267 U.S. 76 (1925), on which the *North New York* court had relied for its conclusion that the FSLIC is to be "assumed to have accepted the ordinary incidents of suits in [the insurance] business" (515 F.2d at 1364). In *Standard Oil Co.*, the Court awarded prejudgment interest on claims for government war risk insurance, but in a later case, *United States* v. *Worley*, 281 U.S. 339 (1930), the Court declined to award prejudgment interest on claims for veterans' life and disability insurance under a subsidized government insurance program. *Standard Oil* was distinguished in *Worley* on the

cuit decision in this case is fully in accord with both these Tenth Circuit decisions.

2. Petitioner also contends, Pet. 14-19, that the court of appeals erred in reversing the district court's award of attorney fees under the Equal Access to Justice Act (28 U.S.C. 2412), because the district court applied an incorrect standard in determining that the government's position was not "substantially justified." In petitioner's view, the district court considered the whole record of the merits litigation, including the decision of the court of appeals on the merits, in reaching its decision that the government's position lacked substantial justification; petitioner contends that the court of appeals reversed on the ground that the appellate merits decision was irrelevant to the EAJA decision. On the basis of that analysis of the decision below, petitioner asserts a conflict with *Sierra Club* v. *Secretary of the Army*, 820 F.2d 513 (1st Cir. 1987), in which the court recognized that the merits decision is one factor to be considered in determining whether the government's position was substantially justified.

Petitioner's argument mischaracterizes the decision of the court of appeals in this case. The court did not hold that its prior merits decision was irrelevant to the substantial justification determination—indeed, it specifically considered that decision in

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ground that the insurance for veterans had a beneficial statutory purpose and was carried out at some cost to the government, while the war risk insurance in *Standard Oil* was a profit making venture. *Id.* at 342-343. As the *Sandia* court explained, 889 F.2d at 262-263, the subsidized flood insurance program more closely resembles the *Worley* model than the profit making *Standard Oil* insurance. The same is true of the deposit insurance at issue here.

determining that the government's position was substantially justified (Pet. App. A23-A24). The fault the court found with the district court's analysis of the substantial justification issue was not that the court considered the prior appellate opinion, but that it relied *solely* on that decision, finding that "because the FDIC's position * * * was held to be 'arbitrary and capricious' and 'not in accordance with law,' it was *ipso facto* not substantially justified" (Pet. App. A22-A23). The court expressly agreed with the First Circuit's decision in *Sierra Club* (Pet. App. A23). As both courts recognize, the merits decision may be a relevant factor in the EAJA analysis, but it is not the only one.

While petitioner may dispute the court of appeals' conclusion that the district court's substantial justification decision turned solely on the merits decision, that fact-specific conclusion does not merit review by this Court. Petitioner does not contend that a district court may properly find a lack of substantial justification solely because the agency decision has been overturned on APA review. Accordingly, petitioner does not object to the legal standard actually applied by the court of appeals; he simply objects to its application to the facts of this case.

3. In any event, the decision of the court of appeals in this case is correct. It is consistent with *Pierce* v. *Underwood*, 487 U.S. 552 (1988), and the great weight of post-*Pierce* cases interpreting the substantial-justification standard in cases involving the review of administrative actions under the Administrative Procedure Act's "arbitrary and capricious" standard. See, *e.g.*, *Abernathy* v. *Clarke*, 857 F.2d 237, 239 (4th Cir. 1988); *Hadden* v. *Bowen*, 851 F.2d 1266, 1267-1268 (10th Cir. 1988) (listing cases indicating pre-*Pierce*

agreement among circuits that lack of substantial evidence supporting government position on APA review does not establish lack of substantial justification); *Trahan* v. *Brady*, 907 F.2d 1215, 1219-1220 (D.C. Cir. 1990); *Louisiana* v. *Lee*, 853 F.2d 1219, 1222 (5th Cir. 1988).

Recently, however, the Second Circuit adopted the position rejected by the court of appeals in this case. In *Federal Election Commission* v. *Political Contributions Data, Inc.*, 995 F.2d 383 (1993), the Second Circuit held that, in addressing the substantial justification issue in the EAJA phase of the case, the district court was "bound by the merits panel's conclusions" (*id.* at 387). The Second Circuit thus adopted the test rejected by the court of appeals in this case (Pet. App. A22-A23): because the government's position was found to be arbitrary and capricious on APA review, the Second Circuit held that it was *ipso facto* not "substantially justified."

The Federal Election Commission plans to file a certiorari petition in *Political Contributions Data, Inc.*[9] Because, as we have explained, petitioner mischaracterizes the standard rejected by the court in this case, and consequently does not defend the standard adopted by the Second Circuit, this case is not an appropriate vehicle for resolving the conflict that has been created by *Political Contributions Data, Inc.* Indeed, since the EAJA issue presented by petitioner does not merit review by this Court, certiorari should be denied. Cf. *Izumi Seimitsu Kogyo* v. *U.S. Philips Corp.*, No. 92-1123, cert. dis-

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[9] The Solicitor General has, to the extent legally required, authorized the General Counsel of the Commission to file the petition on the Commission's behalf.

missed as improvidently granted (Nov. 30). Nevertheless, in light of the current conflict in the circuits, the Court may wish to hold this case pending its action on the petition to be filed in *Political Contributions Data, Inc.*

CONCLUSION

The petition for a writ of certiorari should be denied. Alternatively, the petition should be disposed of as appropriate in light of this Court's action on the petition to be filed in *Federal Election Commission* v. *Political Contributions Data, Inc.*, 995 F.2d 383 (2d Cir. 1993).

Respectfully submitted.

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